Majlis Bandaraya Pulau Pinang v Mohd Noor Sirajajudeen & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-159–01 OF 2017
TENGKU MAIMUN, NALLINI PATHMANATHAN AND ZABARIAH YUSOF JJCA
8 MAY 2018

Contract — Breach — Agreement — Failure to pay fees to engineering firm — Engineering firm issued notice of termination — Claimant sought specific performance of agreements — Whether notice of termination issues was valid — Whether claimant required to give reasons for termination — Whether there was a notice of termination

The respondents ('the plaintiffs') were partners in the firm known as 'Aspirasi Utara Engineering' ('the firm'). The firm was appointed as property manager of the appellant's ('the defendant') express bus terminal at Sungai Nibong, Pulau Pinang. The firm's appointment was for a period of three years commencing on 16 October 2010 (with an option to renew for a further two years) and a principal term of the appointment was the payment by the firm of a monthly appointment fee of RM22,500 ('the fee'). The plaintiffs paid the fees from August–December 2011 but failed to pay the same for the months January–April 2012. The defendant on 4 May 2012 proceeded to issue a notice of termination. The plaintiffs filed a suit against the defendant, claiming for a specific performance of the principal agreement ('the PMA') and the supplemental agreement and for a declaration that the notice of termination by the defendant was invalid, null and void. The defendant denied the plaintiff's claim and contended that the termination was valid in view of the plaintiff's breach of the PMS and the supplemental agreement. The defendant then counterclaimed for damages. The judicial commissioner entered judgment for the plaintiffs and granted the plaintiffs damages in lieu of specific performance. The defendant's counterclaim was dismissed. Hence, the present appeal. The issues that arose were: (a) whether, on a proper construction of the PMA, the defendant was required to give reasons for termination; and (b) whether the notice of termination dated 4 May 2012 was valid or otherwise.

Held, allowing the appeal and setting aside the order of the High Court:

(1) The JC erred in concluding that simply because no reasons were given in the notice of termination that rendered it invalid. The PMA requires the defendant to inform the plaintiffs of the reason for the termination. The notice of termination on 4 May 2012 could have been better worded.

The plaintiffs had actual notice of the reason for termination of the agreement ie that the termination was due to the non-payment of the monthly appointment fee. From the previous correspondence, the plaintiffs were specifically informed of the defaulting event and were given the time to remedy the situation. Although the notice itself did not state in so many words the reason for the termination, the fact remained that the plaintiffs knew that non-payment of the monthly appointment fee would trigger to terminate the plaintiff's appointment (see paras 51, 65 & 68).

(2) The plaintiffs' failure to pay the monthly appointment fee had caused the defendant to suffer loses. The plaintiffs' refusal to pay the monthly fee based on the various reasons advanced by the plaintiffs was also contrary to the interest of the defendant and of the public. The plaintiffs threatened not to allow the companies or their authorised agent to operate at the bus terminal if they failed to register themselves with the plaintiffs' e-ticketing system. The defendant had every right to terminate the PMA (see para 75).

[Bahasa Malaysia summary

Responden-responden ('plaintif-plaintif') adalah rakan kongsi firma yang dikenali sebagai 'Aspirasi Utara Engineering' ('firma'). Firma dilantik sebagai pengurus hartanah terminal ekspres perayu ('defendan') di Sungai Nibong, Pulau Pinang. Pelantikan firma itu adalah untuk tempoh tiga tahun bermula pada 16 Oktober 2010 (dengan pilihan untuk memperbaharui selama dua tahun lagi) dan terma utama pelantikan adalah bayaran oleh firma pelantikan bulanan sebanyak RM22,500 ('yuran'). Plaintif membayar yuran dari Ogos 2011 hingga Disember 2011 tetapi gagal membayarnya untuk bulan-bulan Januari 2012 hingga April 2012. Defendan pada 4 Mei 2012 meneruskan untuk mengeluarkan notis penamatan. Plaintif-plaintif memfailkan saman terhadap defendan, menuntut pelaksanaan spesifik perjanjian utama ('PMA') dan perjanjian tambahan dan untuk perisytiharan bahawa notis penamatan oleh defendan adalah tidak sah dan batal. Defendan menafikan tuntutan plaintif-plaintif dan menegaskan bahawa penamatan itu sah memandangkan pelanggaran PMA dan perjanjian tambahan oleh plaintif-plaintif. Defendan kemudiannya menuntut ganti rugi. Pesuruhjaya Kehakiman memutuskan berpihak pada plaintif dan mengawardkan ganti rugi kepada plaintif sebagai ganti pelaksanaan spesifik. Tuntutan balas defendan ditolak. Oleh itu, rayuan ini. Isu-isu yang timbul adalah: (a) sama ada, dengan pembentukan PMA yang betul, defendan dikehendaki memberi sebab-sebab penamatan; dan (b) sama ada notis penamatan bertarikh 4 Mei 2012 sah atau tidak.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Pesuruhjaya kehakiman terkhilaf dalam menyimpulkan bahawa hanya

kerana tiada alasan yang diberi dalam notis penamatan, ini menjadikannya tidak sah. PMA menghendaki defendan memaklumkan kepada plaintif-plaintif tentang sebab penamatan tersebut. Notis penamatan pada 4 Mei 2012 boleh ditulis dengan lebih baik. Plaintif-plaintif mempunyai notis sebenar tentang sebab penamatan perjanjian iaitu penamatan adalah disebabkan oleh kegagalan membayar bulanan yuran pelantikan bulanan. Berdasarkan surat-menyurat sebelum ini, plaintif-plaintif telah dimaklumkan secara khusus tentang keingkaran dan diberi masa untuk membaiki keadaan. Walaupun notis itu sendiri tidak menyatakan, dengan begitu banyak perkataan, sebab penamatan, hakikatnya tetap bahawa plaintif-plaintif tahu bahawa tidak membayar yuran pelantikan bulanan akan menyebabkan tamatnya pelantikan plaintif-plaintif (lihat perenggan 51, 65 & 68).

(2) Kegagalan plaintif-plaintif membayar yuran pelantikan bulanan telah menyebabkan defendan mengalami kerugian. Penolakan plaintif-plaintif membayar yuran bulanan berdasarkan pelbagai sebab yang dikemukakan oleh plaintif-plaintif juga bertentangan dengan kepentingan defendan dan orang awam. Plaintif-plaintif mengugut untuk tidak membenarkan syarikat atau ejen yang diberi kuasa untuk beroperasi di terminal bas jika mereka gagal mendaftarkan diri dengan sistem e-ticketing plaintif. Defendan mempunyai hak menamatkan PMA (lihat perenggan 75).]

Notes

For cases on agreement, see 3(1) *Mallal's Digest* (5th Ed, 2018) paras 3702–3743.

Cases referred to

Benalec Marine Sdn Bhd v Liziz Standaco Sdn Bhd [2016] 4 MLJ 587, CA (refd)

Chatfield and Another v Elmstone Resthouse Ltd and Others [1975] 2 NZLR 269, HC (refd)

Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd [1996] 3 MLJ 675; [1997] 1 CLJ 287, CA (refd)

Geocon Piling & Engineering Pte Ltd (in compulsory liquidation) v Multistar Holdings Ltd (formerly known as Multi-Con Systems Ltd) and another suit [2015] 3 SLR 1213, HC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)

Ng Chee Weng v Lim Jit Ming Bryan and another and another appeal [2015] 3 SLR 92, CA (refd)

SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464; [2016] 1 CLJ 177, FC (distd)

Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Legislation referred to

Evidence Act 1950 s 92
Land Public Transport Act 2010
Local Government Act 1976

Appeal from: Civil Suit No 21NCVC-30–07 of 2012 (High Court, Pulau Pinang)

Karin Lim Ai Ching (Dominic Pillai and Noor Adzraii b Noor Azhar with him) (Presgrave & Matthews) for the appellant.
Malik Imtiaz Sarwar (Chan Wei June, Lee Khai and Tham Shien Shyong with him) (Ong and Manecksha) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is the appellant's/defendant's appeal against the decision of the High Court in allowing the respondents'/plaintiffs' claim and in dismissing the appellant's/defendant's counterclaim. The claim and counterclaim are premised on a breach of contract.

[2] For convenience, in this judgment, parties will be referred to as they were in the High Court.

THE BACKGROUND FACTS

[3] The plaintiffs are partners of a firm known as Aspirasi Utara Engineering. The defendant is the local authority established under the Local Government Act 1976. The defendant is the proprietor of the Sungai Nibong Bus Terminal ('the bus terminal'), a major bus transportation hub serving the Penang Island.

[4] The bus terminal commenced operations on 17 April 2005. Between 1 March 2006–31 October 2010, the bus terminal was managed by a company known as Janji Cemerlang Sdn Bhd.

[5] In 2010, the defendant sought to replace Janji Cemerlang as its property manager. For that purpose, a tender/quotation exercise was undertaken, where the defendant invited interested and qualified parties to participate in a quotation exercise for the services as the property manager of the bus terminal. Vide a *kenyataan sebutharga* (quotation statement), the defendant fixed the reserve price for the quotation to manage the bus terminal at RM10,000 per month.

[6] In its bid to be appointed as the property manager of the bus terminal, the plaintiffs submitted a quotation dated 29 May 2010 where the plaintiffs offered to pay a monthly appointment fee of RM22,500 per month. The sum of RM22,500 was offered by the plaintiffs based on their own estimate of income and expenditure as set out in their quotation statement.

[7] The plaintiffs were successful in their bid. The plaintiffs' appointment as the property manager of the bus terminal was approved by the defendant in its *mesyuarat perolehan*. The tenure was for three years commencing from 16 October 2010–15 September 2013 with an option to extend the same for two years at the payment rate of RM22,500 per month as the monthly appointment fee. The plaintiffs accepted the defendant's offer.

[8] Pursuant to the plaintiffs' acceptance and vide the defendant's letter dated 7 September 2010, the plaintiffs were required to, inter alia:

(a) take over the management of the bus terminal commencing 16 October 2010;

(b) pay the monthly appointment fee of RM22,500, upon the plaintiffs taking over the management of the bus terminal; and

(c) within one month from 7 September 2010:

(i) pay the defendant RM67,500 being the three months deposit in respect of the monthly appointment fee;

(ii) pay the defendant RM60,000 being the utilities deposit; and

(iii) forward the public liability insurance policy for RM2.5m and fire/destruction insurance policy for RM1.2m in the joint name of the defendant and the plaintiffs and to obtain employees compensation protection policy.

[9] The plaintiffs took over the management of the bus terminal on 1 November 2010. They discovered the operation of illegal touts and unauthorised ticket agents at the bus terminal. By a letter dated 8 November 2010, the plaintiffs complained to the defendant about the illegal touts and unauthorised ticket agents. On 22 November 2010 the plaintiffs wrote to the defendant about defects at the bus terminal. Due to the foregoing problems and after a series of correspondence and upon several requests by the plaintiffs, the management period of the bus terminal was finally deferred until 31 July 2011.

[10] Vide a letter dated 22 August 2011 the defendant informed the plaintiffs that the plaintiffs are required to pay the monthly appointment fee of RM22,500 commencing 1 August 2011. The plaintiffs were further informed

that if the defendant did not receive the said payment within two weeks, the defendant will deem that the plaintiffs are no longer interested in continuing with their appointment as the property manager of the bus terminal.

[11] On 24 August 2011, the plaintiffs forwarded their monthly cash flow accounts to the defendant. The plaintiffs claimed that the profits obtained from the management of the bus terminal was minimal and suggested that the monthly appointment fee be reduced to RM5,000. The plaintiffs further sought to extend the management period for another five years.

[12] On 7 October 2011, the defendant informed the plaintiffs that the plaintiffs' request for a reduction of the monthly appointment fee was rejected. The plaintiffs were required to pay the monthly appointment fee of RM22,500 from 1 August 2011. The plaintiffs were also required to pay the three month deposit and the utilities deposit within 21 days. The plaintiffs were further informed that should they fail to make the said payments, their appointment as property manager of the bus terminal will be withdrawn.

[13] On 20 October 2011, the plaintiffs made payment for the three month deposit amounting to RM67,500 and on the following day, made payment for the monthly appointment fee for August, September and October 2011.

[14] To overcome the issue of illegal touts and unauthorised agents, the plaintiffs submitted a proposal for the implementation of e-ticketing system. The proposal was approved by the defendant vide a letter dated 3 November 2011. The principal agreement ('the PMA') was executed between the parties on 14 November 2011 wherein cl 20, the relevant clause pertaining to the dispute, provides:

20. TERMINATION

20.1 The following shall constitute an event of default:

20.1.1 the failure of Aspirasi Utara Engineering to pay any amount to the Majlis provided for herein when the same is payable; or

20.1.2 ...

20.1.3 ...

20.1.4 ...

20.1.5 The failure of either party to observe any of the other material covenants, undertakings, obligations, conditions and terms set forth in this Agreement. For avoidance of doubt, any failure to observe any of the covenants in this Agreement shall constitute a material and fundamental breach.

20.2 If any of such events of default occurs, the non-defaulting party may give to the defaulting party notice of its intention to terminate the Operating Term after the expiration of a period of one (1) month from the date of such notice and upon the expiration of such period, the Operating Term shall expire. If however, with respect to the events of default referred to in clause 21.1.1 (*sic*) above and unless a specific right of termination is specified elsewhere in this Agreement for the breach in question, upon receipt of such notice the defaulting party shall promptly and with all due diligence cure the default within the said fourteen (14) day period, then such notice shall be of no force and effect.

20.3 ...

20.4 Notwithstanding the above, both parties agree that the Majlis may terminate this Agreement forthwith without prior written notice if, in the sole judgment of the Majlis, the Bus Terminal is being managed and operated by Aspirasi Utara Engineering in a manner contrary to the public interest, interest of the Majlis, convenience and necessity, or in a manner which may cause financial loss to the Majlis.

[15] On 12 December 2011, the supplemental agreement was executed to include new terms for the implementation of the e-ticketing system.

[16] The idea of e-ticketing system was not well-received by the bus operators and/or their authorised agents. On 3 January 2012, parties held a meeting on the implementation of the e-ticketing system and were in consensus that the e-ticketing system would be put in place by April 2012. However, vide a letter dated 10 January 2012, the defendant instructed the plaintiffs to immediately cancel the dateline for the bus operators to register themselves for the e-ticketing system. By a letter dated 17 January 2012, the plaintiffs were also instructed to cease all work for the renovation of e-ticketing counters at the bus terminal, pending a review and decision by the defendant on the e-ticketing system.

[17] The plaintiffs contended that the problem of illegal touts and the unauthorised agents affected the plaintiffs' business and income. The plaintiffs requested for the agreement to be suspended. Between February 2012 and March 2012, the plaintiffs wrote several letters to the defendant requesting that the agreements be suspended from January 2012 until such date when the problem was resolved. Vide a letter dated 2 April 2012, the plaintiffs informed the defendant that the defendant's failure to implement the e-ticketing system amounted to a breach of the supplemental agreement and that the postponement of the e-ticketing system had resulted in the plaintiffs' losses.

[18] On 4 May 2012, the defendant issued a notice of termination. The notice, which was signed by the defendant's legal adviser, reads:

Penamatan Perlantikan Pengurus Hartanah Terminal Bas Ekspress Sungai Nibong, Pulau Pinang

Majlis telah melantik Syarikat tuan untuk menjalankan perkhidmatan pengurusan Hartanah Terminal Bas Ekspress Sungai Nibong, Pulau Pinang bagi tempoh selama tiga (3) tahun mulai 1.8.2011 hingga 31.7.2014 menerusi Kontrak No P/235/2011 bertarikh 14.11.2011.

2. Dengan ini Notis diberi bahawa perlantikan tuan sebagai Pengurus Hartanah Terminal Bas Ekspress di Sungai Nibong *ditamatkan* pada *30 Jun 2012* dan tuan dikehendaki menyerahkan semua kutipan, buku, dokumen, akaun dan lain-lain lagi berhubungkait dengan pengurusan Terminal Bas kepada Majlis.

3. Tanpa Prasangka kepada Notis ini dan hak-hak Majlis, saya diarah menuntut daripada anda, sebagaimana yang saya lakukan sekarang ini, bayaran sebanyak *RM90,000.00* berupa fi perlantikan bagi tempoh dari *Januari 2012 hingga April 2012* atas kadar *RM22,500.00 sebulan*.

PROCEEDINGS IN THE HIGH COURT

[19] The plaintiffs filed a suit against the defendant claiming for, inter alia, a decree of specific performance of the PMA and the supplemental agreement and for a declaration that the notice of termination dated 4 May 2012 issued by the defendant was invalid and null and void.

[20] The defendant denied the plaintiffs' claim. The defendant contended that the termination was valid in view of the plaintiffs' breach of the PMA and the supplemental agreement. The defendant counterclaimed for damages suffered due to the plaintiffs' breach.

[21] Parties formulated separate issues to be tried. There were however common issues relating to the validity of the notice of termination; the issues of defects to the bus terminal; the touts and the e-ticketing system. As regards the issue of defects, touts and e-ticketing system, questions posed were whether it was the defendant's obligation under the PMA to sort out the problems regarding defects and touts and whether the plaintiffs were entitled to withhold payments pending the resolution of the issues of defects, touts and e-ticketing system or whether the plaintiffs were liable to pay the defendant the monthly appointment fee regardless of those problems.

[22] After a full trial, the learned judicial commissioner ('JC') entered judgment for the plaintiffs and granted the plaintiffs damages in lieu of specific performance. The defendant's counterclaim was dismissed. The decision was premised on a short and narrow point, namely, whether the notice of termination was valid. His Lordship found that the notice of termination dated 4 May 2012 was invalid and the termination unlawful. Essentially the learned JC found that the notice of termination did not inform the plaintiffs that they

A were in breach of the agreement and that the notice of termination did not spell out the defaulting event that the plaintiffs were in breach of.

[23] In holding for the plaintiffs, the learned JC relied on the decision of the Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464; [2016] 1 CLJ 177.

[24] Although the defendant, through Cheong Chee Hong ('DW1') led evidence that the termination was premised on the plaintiffs' default to pay the monthly appointment fee under cl 20.1.1 of the agreement, the learned JC concluded that he could not, from the notice of termination, discern what was the default committed by the plaintiffs. The learned JC applied s 92 of the Evidence Act 1950 to hold that the defendant cannot rely on the event of default under cl 20.1.1. as the notice of termination itself was completely silent on the event of default and made no mention of cl 20.1.1.

[25] The learned JC further found that the defendant failed to notify the plaintiffs of the defendant's intention to terminate. Instead the defendant had, vide the notice of termination, terminated the agreement outright. The learned JC also found that as the defendant had failed to state the default committed by the plaintiffs in the notice of termination, the plaintiffs were not able to cure the default whereas the plaintiffs could have done so under cl 20.2 of the agreement.

[26] The learned JC rejected the defendant's alternative submission that cl 20.4 allows the defendant to terminate the agreement forthwith and without prior notice. The learned JC held that the defendant ought not to be allowed to 'split its case to suit them by having an alternative issue' and that 'it was mischievous' for the defendant to do so and that the defendant should not be allowed 'to approbate and reprobate' and to 'blow hot and cold'.

[27] Basically His Lordship held that having sent a notice dated 4 May 2012 to the plaintiffs to terminate the agreement, the defendant cannot now be heard to say in the alternative that they are entitled to terminate without prior notice. This alternative stand, according to the learned JC, smacks of an inconsistent behavior on the part of the defendant.

[28] In addition to the above, the learned JC concluded that the notice of termination was bad in law and was of no effect as it was not written and not signed by either the 'Setiausaha' or the 'Yang DiPertua' of the defendant as defined in cl 1.1 of the PMA. The learned JC held that only the Setiausaha and the Yang DiPertua can act and that they cannot delegate their duties under the PMA to the legal adviser, who is a non-signatory and whose designation does not appear in cl 1 of the PMA.

[29] Aggrieved by the decision of the High Court, the defendant appealed to this court. A

THE APPEAL

[30] We do not propose to set out the extensive submission advanced by learned counsel for the appellant/defendant except to state the gist of it. The defendant's main complaint was on the learned JC's approach in deciding on only one issue, namely on the validity of the notice of termination when there are other sub-issues which require determination by the court. Learned counsel for the defendant also argued that in substance and in effect the notice of termination was in compliance with cl 20.2. B C

[31] Learned counsel further argued that the learned JC wrongly applied the Federal Court decision in *SPM Membrane*. Unlike *SPM Membrane*'s case, in the instant case, the defendant did allude to the reason for termination. Learned counsel referred to para 3 of the notice of termination to submit that the notice did convey the reason for the termination ie the non-payment of the monthly appointment fee. There is therefore, according to learned counsel, actual notice of the breach complained of. Even if the above submission is not accepted, learned counsel for the defendant argued that objectively, at the very least it amounts to constructive notice of the same. D E

[32] As regards the 14 days' notice to remedy the breach, learned counsel submitted that under cl 20.2 of the agreement, the defendant has no obligation to give a separate notice to the plaintiffs. What cl 20.2 provides is that the plaintiffs upon receiving a notice of termination can cure the default within 14 days upon receipt of such notice and if they had done so, the notice would be of no effect. F G

[33] Learned counsel for the defendant emphasised the fact that the notice of termination dated 4 May 2012 was received by the plaintiffs on 10 May 2012. Given that the termination would take effect on 30 June 2012, which is more than a month from the date of receipt of the notice, and by virtue of para 3 of the notice which stipulates the amount payable to the defendant, it was open to the plaintiffs to pay the outstanding monthly appointment fee within 14 days which the plaintiffs failed to do. As such it was submitted for the defendant that the notice of termination had complied with cl 20.2 and that on the facts illustrated above, *SPM Membrane* is distinguishable from the instant case. H I

[34] It was further submitted for the defendant that the plaintiffs' failure to pay the monthly appointment fee is a fundamental breach which entitles the defendant to terminate the agreement.

[35] In any event, learned counsel submitted that the agreement allows the alternative plea. In that regard, learned counsel highlighted that the statement of defence had been specifically amended to plead cl 20.4, which application for amendment was consented to by the plaintiffs. The amended statement of defence reads:

> 61B. Walaubagaimanapun dan secara tambahan, sekirapun Notis Penamatan tersebut diputuskan sebagai gagal mematuhi Klausa 20.2 Perjanjian tersebut (yang dinafikan oleh Defendan), Defendan menegaskan bahawa menurut Fasal 20.4 Perjanjian tersebut, Defendan berhak untuk menamatkan Perjanjian tersebut secara serta-merta tanpa apa-apa notis (dan tanpa apa-apa keperluan memberikan peluang kepada Plaintif-Plaintif untuk meremedikan pelanggaran tersebut), jika atas pendapat tunggal Defendan ('Defendant's sole judgment'), terminal bas tersebut diuruskan oleh Plaintif-Plaintif dalam cara yang bertentangan dengan kepentingan awam, kepentingan Defendan, kemudahan dan keperluan ('convenience and necessity') atau dalam keadaan yang menyebabkan kerugian kewangan ('financial loss') kepada Defendan.

[36] As for its counterclaim, the defendant submitted that notwithstanding the outcome, the defendant is contractually entitled to the relief sought in respect of the handing over of monies, books, documents etc upon termination of the PMA as per cl 20.3.1 of the PMA.

[37] In response, learned counsel for the respondents/plaintiffs submitted that the learned JC was not plainly wrong in confining himself to only one issue and to hold that the notice of termination under cl 20.2 was bad in law. It was further submitted that the notice of termination which gave notice of more than one month was clearly not a termination forthwith under cl 20.4 but a termination under cl 20.2.

[38] Learned counsel argued that it was incumbent on the defendant to state definitively the basis of the said termination which it did not and that the contents of the notice of termination and the surrounding circumstances precluded the defendant from asserting that the termination was effected pursuant to cl 20.4. The learned JC, it was submitted, correctly concluded that the oral evidence of DW1 at trial justifying the termination of the agreement was contrary to s 92 of the Evidence Act.

[39] The plaintiffs also submitted that the learned JC had correctly relied on *SPM Membrane* as the defendant failed to state any grounds for termination in the notice of termination.

THE CASE OF *SPM MEMBRANE*

[40] Given that the learned JC founded his decision on *SPM Membrane*, it is perhaps useful to set out the said case. A

[41] In *SPM Membrane*, pursuant to an agreement entered into between the parties, the appellant was appointed by the respondent to assist the respondent in collecting annual quit rent in Selangor. Clause 8 of the agreement provides for termination by the respondent and by cl 9, a review procedure was provided where in the event the respondent determines that the appellant's performance of services under the agreement was unsatisfactory, the appellant shall be given 30 days' notice to remedy the unsatisfactory situation. And should the performance remains unsatisfactory after the period of 30 days given to remedy the deficiencies, the respondent could terminate the agreement unilaterally. It was also open to the parties to terminate the agreement by agreement; and it was open to the respondent to terminate unilaterally should one of eight grounds listed, including where an inability of the appellant to perform its services were to happen. B C D

[42] The respondent alleged multiples breaches of contract on the appellant's part. In purported exercise of its right under cl 8.1(b) of the agreement, the respondent issued a notice of termination on 22 November 2004 giving 30 days' notice. On 27 November 2004, the termination was effected by way of a subsequent letter. The respondent's letter did not however specify the reason for termination. In the High Court, the trial judge partially allowed the appellant's claim ie for the outstanding sum for services rendered prior to termination whilst the claim for wrongful termination and lost profit was dismissed. The trial judge held, inter alia: E F

(a) the agreement was lawfully terminated under cl 8.1(b) and that cl 9 need not be invoked before cl 8.1(b) was validly exercised;

(b) no reasons were required to be provided for a termination under cl 8.1(b) on the basis that the appellant, in a letter which was not pleaded before the court or tendered in evidence, had appeared to have received the termination notice graciously, and had not objected to the termination; G

(c) the words 'unable to perform its services' was understood to include not only 'inability' but also 'failure' to do so; and H

(d) the appellant was in breach of the agreement.

[43] In upholding the trial judge's decision, this court held that although there was a requirement imposed upon the respondent in the contract to specify the reasons or grounds upon which termination was founded with reference to cl 8.1 to avoid arbitrariness, the obligation to provide a reason or reasons in the notice of termination was not required. I

[44] On appeal to the Federal Court on the question of law whether a notice to terminate a concession/privatisation agreement which was vague, unspecific and uncertain was defective and bad in law, it was held, upon the true construction of the contract, that cl 9 must be invoked and satisfied before termination under cl 8.1(b) may be validly exercised. The Federal Court consequently found that the said cl 8 termination was not valid. The appellant's appeal was allowed and the appellant's claim was remitted to the High Court for assessment of damages, on the issue of quantum occasioned by wrongful termination of the contract.

OUR FINDINGS

[45] The issues for consideration in respect of the termination of the agreement by the defendant in the instant appeal are:

(a) whether, on a proper construction of the PMA, the defendant is required to give reasons for termination; and

(b) whether the notice of termination dated 4 May 2012 is valid or otherwise.

[46] In considering the issues, the following passages of the judgment of the Federal Court in *SPM Membrane* delivered by Her Ladyship Zainun Ali FCJ are instructive:

> [16] In determining the question of law and the appeal before this court, we shall first consider whether there is a requirement of reasons in a notice of termination at common law. If it is shown that none exists, we shall discuss the relevant principles of construction of contracts and then determine if, on the terms of the present contract, such a requirement exists ...
>
> [17] Learned counsel for the appellant submitted that a recipient of notice of termination must be left with no reasonable doubt as to why it was being terminated and what they are required to perform in order to remain compliant with the contract, failing which the notice of termination would necessarily be bad in law.
>
> [18] Counsel for the appellant cited *Perkayuan OKS No 2 Sdn Bhd v Kelantan State Economic Development* ...
>
> [19] Notwithstanding the judgment in *Perkayuan*, there is no suitable authority for the proposition, as a matter of general common law that a notice of termination would necessarily be bad in law in all cases if reasons are not provided in the notice of termination, thereby causing the recipient of the notice to have reasonable doubt as to why they were terminated and what they are required to do, in order to remain compliant to the contract.
>
> [20] Nonetheless, we do recognise that there are certain circumstances in which, as a matter of construction of contract, the recipient of the aforementioned notice is entitled to have the reasons for termination communicated to it by the terminating/non-defaulting party where the contract provides for a 'grace period' in which the defaulting party is entitled to remedy its alleged defective performance to

the satisfaction of the non-defaulting party. This is clearly because a party that is afforded the opportunity to remedy deficiencies in performance cannot do so unless it has notice of the deficiencies, either actual or constructive. This stands to reason.

[21] This proposition holds not as a general proposition in the law of contract, but upon construction where the parties expressly or impliedly agree to it in the contract.

[22] Short of any clear authority, the aforementioned proposition cannot be sustained. In any case, it is too onerous to impose upon every contract the requirement for reasons to be given in the event of termination. We take note, however, that it is in principle possible for the requirement of reasons (whether or not 'sufficient particularised' per the meaning of the Federal Court in *Perkayuan*) to arise as an express or implied term of the contract itself, particularly where the defaulting party is afforded the opportunity to remedy the alleged default in a stipulated period.

[47] The Federal Court went on to consider the principles of construction of contract before concluding as follows:

[65] In stating that there is right under cl 8.1 to be exercised independently of cl 9, the Court of Appeal fails to appreciate the niceties or nuances, if you like, of the contractual terms upon proper construction. Consider for instance, where a review has been instituted under cl 9 pursuant to terms and conditions that have been agreed upon by both parties. Assume also that the terms of the review do not prevent cl 8.1(b) from being invoked during the period of review. If we accept the Court of Appeal's analysis that 'cl 8.1 is a stand-alone clause giving right to the respondent to terminate upon an occurrence of any of the events or reasons set out thereunder ..., it could follow that the respondent is entitled to terminate midway through the review process, provided that the 'company is unable to perform its services as provided under the agreement' is still relevant at the given time. In our view, this would be contrary to the purposes of cl. 8 and, in particular cl 9 of the contract — it cannot be what the parties could reasonably have understood the terms of the contract to mean.

[66] This line of reasoning is further supported if a question is asked: if, at the end of 30 days, the appellant has remedied the 'unsatisfactory performance' under cl 9, would there still be a right on the part of the respondent to terminate under 8.1(b)?

[67] The obvious answer to the question would be 'no' because that would inherently frustrate the purposes of cl 9.

[68] Thus the nub of this appeal is, when one has to choose between two competing interpretations, the one which makes more commercial sense should be preferred if the natural meaning of the words is unclear ...

[48] The Federal Court concluded on the question of law posed in the following manner:

[104] As the aforementioned paragraphs illustrate, the answer to the question of law is perhaps not a simple 'yes' or 'no', but a more nuanced 'it depends on the proper construction of the contract'. Insofar as the appellant contends that the respondent,

A when terminating the contract, has a duty to give reasons in accordance with general law, that contention is false and without authority. Nonetheless, such a duty may be imposed by proper construction of the contract. Factors that lend towards establishing such a duty are, inter alia, where grounds for valid termination of the agreement are particularised in the contract and where the contract purports to give
B the party in breach an opportunity to remedy its unsatisfactory performance, such that without knowledge of the particular alleged breaches, no meaningful effort to remedy them can be taken. In the context of the present case, the notice of termination is bad in law.

C **[49]** Coming back to the instant case, there is no issue of two competing provisions which require construction as to which clause serves business common sense. The only issue insofar as the notice of termination is concerned, is whether it is in compliance with cl 20.2 of the PMA.

D **[50]** In holding that the notice of termination is invalid, the learned JC found that the notice did not inform the plaintiffs that they are in breach of the PMA; that the notice did not spell out the defaulting event; that the notice did not notify the plaintiffs of the defendant's intention to terminate and that the
E notice did not give the plaintiffs 14 days' notice to cure the default. In particular, the learned JC stated that:

28. In Membrane Case because of the reasons given above, the Federal Court held that the notice of termination was invalid, as no reason was given or communicated to the Appellant. Similarly I find that the Letter of Notice of Termination dated
F 4.5.2012 is bad in law and invalid as no reasons was given or communicated from the Defendant to the Plaintiff. Further the letter as stated above did not allow the Plaintiff to remedy or cure the breach which is (sic) had of 14 days ...

[51] With respect, the learned JC erred in concluding that simply because no
G reasons were given in the notice of termination that renders the notice of termination invalid. The question that ought to be considered in our view is not so much whether the notice of termination states any reason but whether the plaintiffs had notice that the reason for termination of the agreement is the non-payment of the monthly appointment fee.

H

[52] For the defendant it was contended that by para 3 of the notice of termination, the plaintiffs had actual notice of the breach complained of. And that even if there was no actual notice, the plaintiffs had constructive notice of
I the same. The plaintiffs had been reminded of the arrears of the monthly appointment fee and the plaintiffs themselves knew that they were in default of the monthly appointment fees as they themselves as recent as February 2012 had requested vide letter dated 1 February 2012 to postpone the PMA and the obligation to pay the monthly appointment fees.

[53] The plaintiffs did not dispute the fact that the monthly appointment fee for January–April 2012 was in fact outstanding when the notice of termination was issued. However, the plaintiffs took the position that they were entitled to withhold payment of the fees because of the pending issues on the defects at the bus terminal; the touts/unauthorised agents and the e-ticketing system.

[54] As a matter of fact, there is no provision in the PMA which allows the plaintiffs to withhold payment of the monthly appointment fee to the defendant. The plaintiffs' conduct was consistent with this fact where notwithstanding their grievances, the plaintiffs did pay for the monthly appointment fee in October 2011 for the months of August, September and October 2011. This shows that the plaintiffs recognised their obligation to pay the monthly appointment fee under the PMA. The plaintiffs also recognised that whether or not payments ought to be deferred pending the resolution of the issues of defects, touts and e-ticketing system is at the absolute discretion of the defendant. Hence, on various occasions, the plaintiffs had requested (*memohon*) or appealed (*merayu*) to the defendant to defer such payment.

[55] Be that as it may, insofar as defects are concerned, pursuant to cl 13 of the PMA, it was the plaintiffs who were responsible, at their own cost and expenses to maintain and repair the bus terminal. The defendant was only responsible for the structural repairs and the implementation of capital improvements for the upgrading of the bus terminal (see cl 14 of the PMA). Similar provisions can be found in the quotation statement at item 3 of *Lampiran* B and item 18(b) of *Lampiran* A, respectively. It has not been established on the evidence that the defects complained of by the plaintiffs, involved structural repairs and/or the implementation of capital improvements to upgrade the bus terminal.

[56] On the issue of touts and/or unauthorised agents, cl 4.1.11 of the PMA imposes an obligation on the plaintiffs not to allow unauthorised bus ticket agents or individuals to sell bus tickets at any place within the bus terminal. Likewise, item 19(e) and (i) of *Lampiran* A and item 1.1(xvi) of *Lampiran* B of the quotation statement stipulates that it was the plaintiffs' duty and responsibility to resolve the issue of touts and/or unauthorised agents, which could be done by the plaintiffs referring the matter to the relevant authority or to Suruhanjaya Pengangkutan Awam Darat under the Land Public Transport Act 2010.

[57] As for the e-ticketing system which came about by virtue of the supplemental agreement, the bus operators and/or their authorised agents had raised objections with the defendant. In view of the objections, the defendant decided to defer, not to cancel, its implementation until further study. Since there was no cancellation of the e-ticketing system, we are of the view that the

defendant could not be said to be in breach of the supplemental agreement. In any event, we opined it is reasonable for the defendant to take such a course to defer the implementation of the e-ticketing system as essentially, it was the defendant's responsibility as the local authority and owner of the bus terminal to provide the terminal for the convenience of the general public. The objections, if left unattended, will ultimately threaten the smooth operations of the bus terminal and will in turn cause discomfort and inconvenience to the public.

[58] Further, from the contemporaneous document, we find that the reason for non-payment of the monthly appointment fee of RM22,500 has nothing to do with the defects of the bus terminal, the touts or the suspension of the e-ticketing system. Rather, it was purely a business consideration. To be more precise, the reason was because the plaintiffs were not making much profit and could not afford to pay the monthly appointment fee as agreed. This can be seen from the plaintiffs' letter dated 24 August 2011 to the defendant which reads:

> ... difahamkan pihak tuan telah meluluskan penangguhan kontrak kami iaitu Pengurusan Dan Penyelenggaraan Terminal Bas Ekspres Sungai Nibong ...
>
> 2. Walaubagaimanapun, pihak kami telah menghantar laporan akaun pengurusan yang lengkap bermula dari bulan November 2010 hingga Julai 2011 dimana pihak kami telah bertungkus lumus mengubah corak pengurusan terminal bas berkualiti.
>
> 3. Di dalam akaun pendapatan serta perbelanjaan yang dilaporkan, ternyata pihak kami berjaya mengubah corak pengurusan terminal tanpa sebarang penangguhan bayaran pengoperasian terminal jika dibandingkan dengan pengurusan dahulu. Ternyata selama tempoh 9 bulan, pihak kami telah mengurus sebaik mungkin terminal ini dengan keuntungan yang minimum dan tidak mampu membayar sewa kontrak bulanan kepada pihak tuan.
>
> 4. Pihak kami ingin mencadangkan bayaran minimum kontrak bulanan sebanyak RM5,000.00 sahaja (*Fee Pengurusan AUE*) yang mampu dibayar kepada pihak MPPP mulai bulan Ogos 2011 sehingga pihak kami melaksanakan sistem e-Ticketing ...
>
> Kerjasama pihak tuan amat diharapkan dan dihargai dalam menyelesaikan masalah di TBESN supaya pihak kami dapat mengubah corak pengurus berkualiti, moden dan efisyen demi penduduk Pulau Pinang.

[59] The defendant rejected the plaintiffs' appeal for a reduction of the monthly appointment fee. Vide a letter dated 7 October 2011, the plaintiffs were informed that they were required to make payment of the monthly appointment fee of RM22,500 and that failure to do so constituted an event of default entitling the defendant to terminate the PMA. After the PMA was executed on 14 November 2011, the plaintiffs made the necessary payments as agreed until 31 December 2011.

[60] The plaintiffs stopped making the monthly appointment fee after the defendant decided on 10 January 2012 to defer the implementation of the e-ticketing system. In this regard we noted that the plaintiffs did not object to the deferment of the implementation of the e-ticketing system. From the letters written by the plaintiffs to the defendant, the plaintiffs were merely requesting for a date to be fixed for its implementation.

[61] We further noted that after the execution of the PMA, the plaintiffs made no complaints until the issuance of the notice of termination when the plaintiffs contended that the payment of the monthly appointment fee for the months of January–April 2012 did not arise as the repair works on the defect have not been completed.

[62] By analogy, learned counsel for the defendant referred us to the situation of a landlord and tenant, ie where the lessor is in breach of his covenant to repair, the lessee must still pay the rent. *Chatfield and Another v Elmstone Resthouse Ltd and Others* [1975] 2 NZLR 269 and *Chitty on Contracts* (23rd Ed) were cited in support thereof. We find much force in the submission for the defendant that the plaintiffs are not entitled to withhold payment of the monthly appointment fee on the basis that the alleged defects or repair works to the bus terminal have yet to be completed.

[63] It is also worthy to note that despite the plaintiffs' complaints on the issues regarding defects at the bus terminal, the touts/unauthorised agents and the e-ticketing system, the management accounts for the period between November 2010–July 2011 provided by the plaintiffs revealed that the bus terminal was fully operational and had been generating income to the plaintiffs. Clearly the issues raised did not affect the plaintiffs' management of the bus terminal and could not therefore be a valid reason for the plaintiffs' refusal to pay the monthly appointment fee to the defendant.

[64] Hence, we find no justification for the plaintiffs to withhold payment to the defendant of the monthly appointment fee in the sum of RM22,500 as agreed under the PMA. More so when cl 20.1.5 of the agreement stipulates that the plaintiffs' failure to make such payment constitutes a material and fundamental breach and under cl 20.2 read with cl 20.1.1, the defendant is entitled to terminate the said agreement (see *Ching Yik Development Sdn Bhd v Setapak Heights Development Sdn Bhd* [1996] 3 MLJ 675; [1997] 1 CLJ 287; *Benalec Marine Sdn Bhd v Liziz Standaco Sdn Bhd* [2016] 4 MLJ 587).

[65] We accept that cl 20.2 of the PMA requires the defendant to inform the plaintiffs of the reason for the termination. The notice of termination dated 4 May 2012 could have been better worded. However, on the factual matrix of this case, we entertain no doubt that the plaintiffs had actual notice of the

reason for termination of the agreement ie that the termination was due to the non-payment of the monthly appointment fee. From the previous correspondence, namely by letters dated 22 August 2011 and 7 October 2011, the plaintiffs were specifically informed of the defaulting event and were given time to remedy the situation. The letter dated 22 August 2011 states:

> 2. Sila ambil perhatian bahawa pihak tuan dikehendaki membayar fi pelantikan mulai 1 Ogos 2011 sebanyak RM22,500.00 sebulan.
>
> 3. Sekiranya Majlis tidak terima bayaran tersebut dalam tempoh 2 minggu dari tarikh surat ini, maka pihak Majlis menganggap pihak tuan tidak lagi berminat untuk perlantikan perkhidmatan pengurus harta di Terminal Bas Ekspress Sungai Nibong.

[66] Whereas the letter dated 7 October 2011 reads:

> 3. Selain itu, pihak tuan juga dikehendaki untuk menjelaskan dalam tempoh 21 hari dari tarikh surat ini bayaran-bayaran yang berikut seperti yang dinyatakan dalam surat tawaran Majlis bertarikh 7 September 2010 ...
>
> (a) ...
>
> (b) ...
>
> 4. ...
>
> 5. Sekiranya tuan gagal berbuat demikian, Majlis akan menarik balik pelantikan perkhidmatan pengurus harta tersebut.

[67] By way of comparison, learned counsel for the plaintiffs submitted that the defendant had clearly stated in the above two letters the defaulting event as well as the time period for remedying the same and the consequences in the event the plaintiffs failed to remedy the situation, as opposed to the notice of termination dated 4 May 2012 which lacked all those particulars. This, according to learned counsel, supports the plaintiffs' position that the notice of termination is not a valid termination under cl 20.2 of the PMA.

[68] Although the notice itself did not state in so many words the reason for the termination, the fact remains that the plaintiffs knew that non-payment of the monthly appointment fee would trigger an event of default and that the defendant will exercise its right to terminate the plaintiffs' appointment. Further, from the date of receipt of the notice of termination until the date the termination was to take effect which was well within the required period for the plaintiffs to cure the remedy, the plaintiffs had every opportunity to pay the sums due to the defendant, which they did not.

[69] For completeness, we are of the view that the application of s 92 of the Evidence Act in respect of the oral testimony led by the defendant on the reason for termination, did not arise. As for the learned JC's finding that the notice of

termination is bad in law and is of no legal effect as it was written and signed by the legal adviser instead of the Setiausaha or the Yang Dipertua of the defendant, it cannot be sustained. This issue was neither pleaded nor raised by the parties during trial and it is trite that the court is not entitled to decide a suit on a matter on which no issue has been raised by the parties (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152).

[70] As we understand *SPM Membrane*, it does not lay down the principle that in every case where a notice of termination does not state the reason, that notice must necessarily be rendered bad in law. It depends on the facts and circumstances of a particular case. In the context of this case, we hold that the notice of termination dated 4 May 2012 is valid and good in law.

[71] Assuming that the notice of termination is invalid and bad in law under cl 20.2, cl 20.4 clearly allows the defendant to terminate the agreement without notice. Hence, even if we were to disregard the notice of termination dated 4 May 2012, the effect of the defendant's decision to terminate the appointment of the plaintiffs as the property manager of the bus terminal remains valid pursuant to cl 20.4 of the PMA.

[72] The termination under cl 20.4 had been pleaded by the defendant in the alternative in the amended statement of defence. We do not see any inconsistency in the position taken by the defendant to plead that the termination was validly done under cl 20.2 or in the alternative under 20.4 of the PMA.

[73] The defendant did not place two versions of facts which were contradictory to each other but the defendant placed two alternative legal arguments derived from the same set of facts. One legal argument was that there was a valid notice of termination under cl 20.2. The other legal argument was that if the termination under cl 20.2 is found to be invalid, the same facts show that the notice of termination is valid under cl 20.4 of the PMA (see *Ng Chee Weng v Lim Jit Ming Bryan and another and another appeal* [2015] 3 SLR 92; *Geocon Piling & Engineering Pte Ltd (in compulsory liquidation) v Multistar Holdings Ltd (formerly known as Multi-Con Systems Ltd) and another suit* [2015] 3 SLR 1213).

[74] The alternative plea did not defy common sense and the question of the defendant splitting its case or that the defendant was mischievous or was approbating and reprobating in relying on cl 20.4 does not arise. Particularly, when the amendment to the statement of defence was effected pursuant to an order of court dated 6 May 2015 without any objections from the plaintiffs. Neither did the plaintiffs file any amended reply to the amended defence.

[75] The plaintiffs' failure to pay the monthly appointment fee had caused the defendant to suffer losses. The plaintiffs' refusal to pay the monthly appointment fee based on the various reasons advanced by the plaintiffs is also contrary to the interest of the defendant and of the public. The plaintiffs had threatened not to allow the bus companies or their authorised agent to operate at the bus terminal if they failed to register themselves with the plaintiffs' e-ticketing system. Hence under cl 20.4, the defendant has every right to terminate the PMA as the matters therein are to be determined in its sole judgment.

CONCLUSION

[76] Having regard to the foregoing, we are unanimous in our decision that this case warrants appellate intervention. The learned JC was plainly wrong in his application of *SPM Membrane* and in failing to consider the context of the case before concluding that the notice of termination was bad in law. The appeal is therefore allowed with costs. The order of the High Court is set aside. We grant order in terms of the defendant's counterclaim as per paras 84(i)–(x) of the amended statement of defence.

Appeal allowed and order of the High Court set aside.

Reported by Afiq Mohamad Noor